Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

No. 96-

MICHELLE PRICKETT, BOBBY PRICKETT, AND RITA ROBERTSON, as Administrators of the Estate of Jeffrey Prickett, deceased,
Petitioners,

vs.

NORFOLK SOUTHERN RAILWAY COMPANY and DAVID W. STEPHENS,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Alabama

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PETITION FOR A WRIT OF CERTIORARI

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March 10, 1997

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QUESTIONS PRESENTED

I. Is there jurisdiction to review this "no opinion" decision of the Supreme Court of Alabama?

II. Is the purpose and intent of the Federal Railroad Safety Act and the 1973 Amendment to the Federal Highway Safety Act, to improve grade crossing safety, advanced when state tort claims of inadequate crossing protection are preempted under 45 U.S.C. § 434 when the evidence is that federal aid projects at the crossing are either 1) started but not completed or, 2) did not include signals and gates when circumstances at the crossing demanded such equipment?

III. Is the purpose and intent of the Federal Railroad Safety Act and the 1973 Amendment to the Federal

Highway Safety Act, to improve grade crossing safety, advanced when state tort claims of excessive train speeds are preempted under 45 U.S.C. § 434 at crossings determined to require signals and gates, during the time between identification of the need for the additional equipment and installation of the additional equipment?

LIST OF PARTIES

All parties to the proceeding are listed in the caption to the petition.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 45 U.S.C. § 434, currently codified at 49 U.S.C. § 20106:

> The Congress declares that laws, rules, regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

2. 23 C.F.R. § 646.214(b), promulgated by the Secretary of Transportation pursuant to the authority given under the Federal Highway Safety

Act of 1973, 87 Stat. 282, 23 U.S.C. § 130:

(b) Grade Crossing Improvements.

(1) All traffic control devices proposed shall comply with the latest edition of the Manual of Uniform Traffic Control Devices for Streets and Highways supplemented to the extent applicable by State standards.

(2) Pursuant to 23 U.S.C. 109(e), where a railroad-highway grade crossing is located within the limits of or near the terminus of a Federal-aid highway project for construction of a new highway or improvement of the existing roadway, the crossing shall not be opened for unrestricted use by traffic or the project accepted by FHWA [Federal Highway Administration] until adequate warning devices for the crossing are installed and functioning properly.

(3)(i) Adequate warning devices, under 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

(A) Multiple main line railroad tracks.

(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(C) High speed train operation combined with limited sight distance at either single or multiple track crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of school buses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

(F) A diagnostic team recommends them.

(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable.

(4) For crossings where the requirements of 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of the FHWA.

IN THE SUPREME COURT OF THE UNITED STATES

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Petition for a Writ of Certiorari to the Supreme Court of Alabama

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama entered in this case.

OPINIONS BELOW

The decision of the Supreme Court of Alabama was entered on October 11, 1996, and is not reported yet, and is included in the Appendix at 1-3. Prickett v. Norfolk Southern Railway, No. 1940479 (Ala. 10/11/96). The opinion of the Circuit Court of Calhoun County, Alabama, granting summary judgment in favor of Respondents, is not reported and is included in the Appendix at 4-22.

STATEMENT OF JURISDICTION

The Supreme Court of Alabama affirmed the trial court's judgment on October 11, 1996. App. 1-2. The order denying Petitioners' timely application for rehearing was entered on December 13, 1996. App. 3. This Court has jurisdiction pursuant to 28 U.S.C. § 1257 (a).

STATEMENT OF THE CASE

1. The accident.

Jeffery Prickett was killed on December 28, 1992, when his pickup truck was struck by a Norfolk Southern train operated by engineer David Stephens at the DeArmanville crossing in Calhoun County, Alabama. The crossing was protected only with crossbuck signs and stop signs, and "R X R" pavement markings. The highway approaches the crossing at an acute angle until just immmediately before the crossing when it turns sharply to the right and intersects the crossing at about ninety degrees.

The accident train approached the crossing from behind Mr. Prickett's right shoulder at a speed of 44 m.p.h. Mr. Prickett followed a white truck over the crossing. Engineer Stephens saw the trucks when the train was about 500 feet

from the crossing. Mr. Prickett appeared to be going about 15 m.p.h and slowing to stop. When Engineer Stephens realized that Mr. Prickett apparently had not seen the train and was not stopping, the train was only about 50 feet from the crossing. The train struck the truck on the passenger side. (Petitioners' Application for additional facts to the Supreme Court of Alabama, App. 66-74.)

Witnesses in the immediate vicinity of the crossing said they did not hear the train blow its whistle on this occasion. (App. 9; 69)

2. The proceedings below.

Petitioners filed this wrongful death action against Respondents in the Circuit Court of Calhoun County, Alabama, alleging that the Respondents had maintained an unsafe crossing that did not have flashing signals and gates, and

that Respondents operated the train at an excessive speed and failed to blow the whistle to warn of the train's approach to the crossing.

Respondents filed a motion for summary judgment on all counts. The circuit court granted the summary judgment concluding:

> that federal funds participated in the installation of warning devices at the crossing ... with the approval of the Federal Highway Administration prior to the accident in question, and that the defendants are entitled to a judgment as a matter of law on the plaintiffs' claims seeking to impose liability on the railroad for inadequate warning devices at the crossing. App. 18.

The circuit court cited as support for its preemption decision, Borden v. CSX Transp., Inc., 843 F. Supp. 1410 (M.D. Ala. 1993); Armijo v. Atchison, Topeka & Santa Fe Ry., 19 F. 3d 547 (10th Cir. 1994); CSX Transp., Inc. v. Easterwood,

507 U.S. 658 (1993). App. 19.

The circuit court further held that the claim of excessive speed was preempted by federal law, 45 U.S.C. § 434, App. 8, and that Mr. Prickett was contributorily negligent in failing to stop at the stop sign at the crossing. App. 8-10.

Petitioners appealed to the Supreme Court of Alabama arguing that: 1) This wrongful death claim alleging the railroad's failure to maintain a safe crossing is not preempted under 45 U.S.C. § 434 when the railroad has used federal funds to work on the crossing, but has failed to meet the requirements of 23 C.F.R. § 646.214(b), the regulations created by the Secretary of Transportation to establish the guidelines for federal aid projects, App. 29-53, 2) the claim that the train was

being operated at an excessive speed is not preempted under 45 U.S.C. § 434, when the accident occurs after a determination has been made that a crossing requires signals and gates under 23 C.F.R. § 646.214(b), but before the actual installation of the signals and gates, App. 53-56, and 3) Mr. Prickett's failure to stop at the stop sign was not the proximate cause of his death, App. 57-64.

The Supreme Court of Alabama affirmed without opinion, App. 1-2, and cited as support for its affirmance the Borden, 843 F. Supp. 1410, and Easterwood decisions. App. 3.

Petitioners made application for rehearing and additional facts before the Supreme Court of Alabama, App. 66-74, pointing out that the court's decision on preemption could not be reconciled with Easterwood and its progeny, nor the

Alabama court's earlier decision in Hamlin v. Norfolk Southern Ry., No. 1931221 (Ala. 7/12/96), which is now pending before this Court on the Norfolk Southern's Petition for writ of certiorari to the Supreme Court of Alabama to review this same issue. Hamlin v. Nofolk Southern Ry., No. 96-1332 (filed 2/20/97).

3. The governing regulatory scheme

In 1970, Congress enacted the Federal Railroad Safety Act, 45 U.S.C. §§ 421, et seq, intending that grade crossings would be improved to a national standard, and preempting all state regulation to the contrary. 45 U.S.C. § 434. Towards this end, a program was established by the Federal Highway Safety Act, codified at 23 U.S.C. § 130, to provide funds to the individual states to improve their crossings conditional upon

the states surveying their crossings, identifying those crossings in need of protective devices, and implementing a schedule of projects to accomplish the same. 23 U.S.C. § 130(d). Regulations were promulgated by the Secretary dictating the type of warning devices to be installed with federal funds received under the Act. 23 C.F.R. § 646.214(b). For example, if a crossing has "multiple tracks," "continuing accident occurrences," or "unusually restricted sight distance," or any of the other features listed in 23 C.F.R. § 646.214(b)(3), then any federal aid project at that crossing must include installation of automatic signals and gates, unless a diagnostic survey justifies their absence.

When considering whether the Highway Safety Act has preempted a state law, the

courts must consider whether a federal aid project to improve the crossing was completed in compliance with the Act and regulations. For example, if 23 C.F.R. § 646.216(b)(3) requires that a federal aid project include installation of signals and gates because of the particular crossing features, and gates and signals are not installed, then there has been no compliance with the Act, and a state claim is not preempted. See Easterwood, 507 U.S. at 660, 670. However, if a crossing is the subject of a federal aid project and the protection devices required by 23 C.F.R. § 646.216(b)(3) are installed, a state law claim that the crossing protection was inadequate will be preempted.

4. The DeArmanville crossing

In 1978, a federal aid project was done to install warning signs and "R X R"

pavement markings at the DeArmanville crossing. Although the crossing had "multiple tracks" and an "unusually restricted sight distance" created by the angle of the highway to the crossing, which are special crossing features that mandate installation of signals and gates under 23 C.F.R. § 646.214(b)(3), no signals and gates were installed and no diagnostic study excused their absence. App. 15-18; 71-73.

Between 1978 and 1988, five motor vehicle-train collisions were reported at this crossing. App. 69.

A diagnostic review was performed at this crossing in 1988, which concluded that the DeArmanville crossing required signals, gates, bells, motion predictors, chevron signs and tree cutting. App. 72. The authorization for this project was signed by the Highway Administration on

December 29, 1992, one day after Mr. Prickett's accident, and claimed to be effective back to Octrober 27, 1992. App. 72. The project was actually completed and the signals and gates fully functional in April 1993. App. 73.

From 1988 through December 29, 1992, nine more motor vehicle-train collisions were reported at the DeArmanville crossing. App. 69.

Respondent railroad has argued throughout this case that since 1978, when federal funds were first used to install signs and pavement markings at the crossing, that the crossing has been in compliance with the Act, and all state law governing the crossing since then is preempted. Respondent has maintained this position even though in 1988, a diagnostic review concluded that the crossing required signals and gates.

Petitioners have maintained that there can be no federal preemption unless federal funds are used in compliance with the Federal Highway Act and the regulations promulgated thereunder establishing the guidelines for use of the funds.

REASONS THE WRIT SHOULD ISSUE

1. No independent state ground.

The Supreme Court of Alabama obviously considered and affirmed the circuit court's summary judgment that the Petitioners' claim of wrongful death due to inadequate crossing protection and excessive train speed was preempted under 45 U.S.C. § 434, as evidenced by its citation to Easterwood and Borden, 843 F. Supp. 1410. App. 1. The Easterwood decision is, of course, the lead decision when discussing federal preemption of state claims of inadequate grade crossing

protection and excessive train speeds. Borden is an opinion from an Alabama district court addressing the issues of federal preemption under 45 U.S.C. § 434 and contributory negligence in an Alabama wrongful death action arising from a grade crossing accident. Borden was cited by the circuit court as support for its decision that Petitioners' claims were preempted by section 434, App. 19.

In Michigan v. Long, 463 U.S. 1032 (1983), this Court held that:

> when...a state court decision fairly appears to rest primarily upon federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in

> its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.

Id., at 1040-41. Of course, the Supreme Court of Alabama made no clear and express statement that its decision was based on a "separate, adequate, and independent grounds." Id. at 1041.

This Court may perceive that the Alabama court's decision is unclear whether there is an independent state ground, but that alone should not prevent this Court from taking jurisdiction.

> [A]mbiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal consitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases....For no other course assures that important federal issues...will reach this Court for ajudication; that state courts will not be the final arbiters of important federal issues

under the federal constitution. Arizona v. Evans, 115,S. Ct. 1185, 1190 (1995), citing Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940).

Federal preemption is an "important federal issue" that this Court should review. Id. There are 170,000 public grade crossings in the United States, and as of 1992, only 70,000 are protected by automatic signals. U.S. Dept. of Transp., Federal Railroad Admin., Office of Safety, Highway-Rail Crossing Accident/Incident, and Inventory Bulletin No. 15, (1992) Tables 33, 37. The other 100,000 crossings have only stop signs or crossbucks. Many states implemented federal aid programs in the late 1970's and early 1980's to install crossbuck signs and pavement markings at all grade crossings in their state, regardless of whether the crossings had any of the

special hazards identified in 23 C.F.R. § 646.214(b)(3). To allow the railroads to claim federal preemption under these circumstances retards, not advances, the purpose of the Federal Railroad Safety Act and the Highway Safety Act to achieve national uniformity in grade crossing safety. Not all grade crossings are the same, and consequently, not all grade crossings require the same protection. Congress and the Secretary understood this simple idea. Perhaps because of the study performed by the Secretary at the direction of Congress in 1972, 45 U.S.C. § 433(a), specific crossing features were identified by the Secretary as being indicia of a hazardous crossing. Those features were incorporated into 23 C.F.R. § 646.214(b)(3), and if they are present at a crossing, it has been determined that signals and gates are required to

reduce the hazard. The only exception to this are those crossings where a diagnostic team has evaluated the crossing and concluded that the additional warnings are not necessary. The Supreme Court of Alabama did not promote Congress' goal of increasing crossing safety when it held in effect that the expenditure of federal funds for signs and paint at all crossings in Alabama, including the DeArmanville crossing, without regard for the particular hazards of individual crossings, was determined by the Secretary to improve grade crossing safety at those crossings.

The issue of the proximate cause of the accident is "interwoven with the federal law" issue of whether Petitioners can maintain their claim that the death of Mr. Prickett was due to inadequate

crossing protections. The defense that Mr. Prickett's negligence caused his own death is directly related to whether this crossing had any of the hazardous features which required installation of signals and gates to make the crossing safe. If the hazard posed by the crossing could be alleviated by driver action alone, it would not need signals and gates.

This confluence of claim and defense is similar to that addressed by the Court in Cornell Steamboat Co. v. Phoenix Construction Co., 233 U.S. 593 (1914), in which a steamboat company sued a construction company for damages caused when the steamboat's barges struck the construction barges anchored in the Hudson River to perform work in the river bed itself. The steamboat company claimed that the construction barges were

an unlawful obstruction in the channel. The construction company alleged that the steamboat had been negligently operated. The appellate court held that the construction company had federal authority to anchor barges in the river bed and to perform work from the barges, and further, that the steamboat company had negligently operated its boats to strike the construction barges. Id. at 598. This Court, in holding that it had jurisdiction to consider the federal question, said:

> Because the elements involved in the decision of this Federal question are intermingled with the elements necessary to be considered to determine whether there was negligence irrespective of the Federal right affords no reason for not considering and disposing of the issue which the case presents from the Federal aspect, or to treat it as nonexisting. It is indeed true that the fact of negligence, in and of itself,...may be a state question,....But when negligence involves and concerns a subject of

> Federal jurisdiction which it is our duty to decide, to the extent necessary to enable us to discharge that duty, we must consider and review the subject independent of the action of the state court.

Id. at 599.

This Court should also consider that the Respondent railroad in this case, has filed a Petition for writ of certiorari to the Supreme Court of Alabama asking this Court to review the same federal preemption issue raised here by Petitioners. Hamlin v. Norfolk Southern Railway Co., No. 96-1332 (filed 2/27/97). The underlying facts in Hamlin relating to that accident and the crossing history and its condition on the date of that accident, cannot be distinguished from the facts of this case. Essentially, Respondent railroad and Petitioners are in agreement that federal preemption under 45 U.S.C. § 434 is an important

federal question which needs further review by this Court.

2. Federal preemption of state claims of inadequate crossing protection.

The decision of the Supreme Court of Alabama is in conflict with 45 U.S.C. § 434 and the stated intent of the Federal Railway Safety Act and the 1973 Amendment to the Federal Highway Safety Act. It cannot be reconciled with this Court's decision in Easterwood, 507 U.S. 368, and the decisions of several circuits interpreting § 434. Michael v. Norfolk Southern Railway Co., 74 F. 3d 271 (11th Cir. 1996); Thiele v. Norfolk & Western Railway Company, 68 F. 3d 179, 182 (7th Cir. 1995); Hester v. CSX Transp., 61 F. 3d 382, 386 n.6 (5th Cir. 1995), cert. denied, 116 S. Ct. 815 (1996); St. Louis Southwestern Railway Co. v. Malone Freight Lines, 39 F. 3d 864 (8th Cir.

1994), cert. denied, 115 S. Ct. 1963 (1995); Shots v. CSX Transp., Inc., 38 F. 3d 304 (7th Cir. 1994).

Easterwood clearly held that there is federal preemption of state law tort claims of inadequate crossing protection if the following conditions are met:

1.a. At crossings with any of the hazardous features listed in 23 C.F.R. § 646.214(b)(3), any federal aid improvement project must include installation of automatic signals and gates. Easterwood, 507 U.S. at 666.

b. At crossings with (b)(3) features, if signals and gates are not installed as part of a federal aid project, there must be a diagnostic team excusing the absence. Id.

2. At crossings which do not contain any (b)(3) features, approval by the

Secretary of the type of warning used, must be shown for preemption. Id. at 667; 23 C.F.R. § 646.214(b)(4).

3. Federal funds must be used to pay for the improvement project.

All the circuit decisions listed above, and Easterwood, have held that this analysis is proper. First, look to see if the crossing is a (b)(3) crossing. If it has features of subsection (b)(3), there will be preemption only when the federal improvement projects at the crossing included installation of signals and gates, unless a diagnostic team has determined they are not needed. If there are no (b)(3) features, then there will be preemption only if the FHWA Secretary approved the type of warning devices installed. This is the only analysis which continues to promote Congress's

original intent to increase grade crossing safety at all crossings in this country.

The DeArmanville crossing has "multiple tracks," "unusually restricted sight distance" caused by the angle of approach to the crossing, and "continuing accident occurences." 23 C.F.R. § 646.214(b)(3). None of the federal improvement projects completed prior to Mr. Prickett's accident involved the installation of automatic signals and gates, and there was no diagnostic survey excusing their absence. To have held that there is preemption on the basis of any of these federal aid projects cannot be reconciled with the decisions listed above, or with the Acts themselves.

Respondent railroad has continually argued that the expenditure of federal funds for pre-installation engineering or

actual installation, is sufficient to qualify for federal preemption, and has cited Easterwood as support for this claim. However, this Court held in Easterwood that there was no preemption because the facts did "not establish that federal funds participated in the installation of the warning devices at Cook Sreet." Easterwood, 507 U.S. at 672. In fact, there had been an expenditure of federal funds for pre-installation engineering costs on the Cook Street project. In effect, Easterwood held that the mere expenditure of funds for engineering, without expenditure of funds for actual construction, is not sufficient to support federal preemption under the statute.

It is in keeping with the intent of Congress that expenditure for actual

construction of the required devices is necessary before there can be preemption. It is not the expenditure of the first dollar, or the approval by the Secretary for the project which triggers preemption.

> The view that preemption runs from the time of federal approval is inconsistent with the FRSA's goal of promoting safety at railroad crossings....The Railway's interpretation that federal approval triggers preemption would leave the public unprotected between the time of approval and the time the prescribed devices are installed and operating. This can be a substantial amount of time....To encourage prompt installation of federally funded prescribed warning devices, a railroad's common-law duty of care must continue until those devices are installed.

Malone Freight, 39 F. 3d at 867.

> Moreover, adopting the rule [the railway] proposes would mean that for projects where the federal government approved warning devices or prescribed them for a particular crossing, but for some reason the project was never completed (e.g. lack of funding...), the public would be unprotected indefinitely,

> even though nothing had actually changed at the crossing.

Thiele, 68 F. 3d at 184.

The Supreme Court of Alabama's decision cannot be reconciled with the acts governing crossing safety or the decisions under them. However, the more important reason for granting this Petition is that questions remain after Easterwood regarding federal preemption under 45 U.S.C. § 434. Can preemption be based upon the mere expenditure of federal funds to improve a crossing? Is approval by the Secretary implied by the expenditure of federal funds? Is it sufficient that federal funds are spent for pre-installation engineering, or must the construction of the required devices be complete before a state claim will be preempted? Can there be preemption of a state claim involving a (b)(3) type

crossing if the Secretary approves the project without signals and gates, even in the absence of a diagnostic review?

These questions have been raised by counsel for highway users, railroads, and courts, and the answers have been nearly as numerous as the questions. See, e.g., the Petition filed by Respondent in Hamlin v. Norfolk Southern, No. 96-1332.

3. Federal preemption of state negligence claims of excessive speed.

Section 434, Title 45, contains a savings clause which states:

> a State may adopt...a more stringent...standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard."

Petitioners only contention on this claim is that after a diagnostic team has concluded that a crossing requires signals and gates, that crossing is a "local safety hazard" known to the

railroad, and until the signals and gates are actually installed, the railroad should be obligated to modify its operations at that identified crossing. Until gates and signals are actually installed, the public is protected only by the railroad's exercise of due care at the crossing. Earwood v. Norfolk Southern Railway Co., 845 F. Supp. 880, 886-87 (N.D. Ga. 1993). A claim that the railroad failed to modify is operation, and reduce its speed at this crossing pending the construction of the devices, should not be preempted under section 434.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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